United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

~~76-8437~~

76-1508

To be argued by
Frederick H. Cohn:
25 minutes

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA :

-against- : Docket No. 76-8437

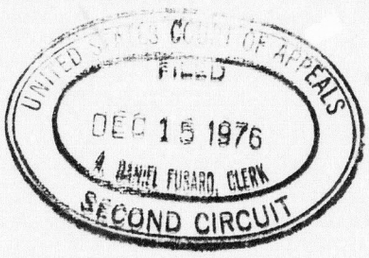
LEROY HAYES, :

Appellant. :

----------x

On Appeal From the United States District Court
For the Southern District of New York

BRIEF FOR THE APPELLANT



FREDERICK H. COHN
299 BROADWAY
NEW YORK, NEW YORK 10007
(212) 349-7755

ATTORNEY FOR Appellant

To be argued by
FREDERICK H. COHN:
25 Minutes

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-against-

LEROY HAYES,

Appellant.

Docket No. 76-8437

On Appeal From the United States District Court
For the Southern District of New York

BRIEF FOR THE APPELLANT

TABLE OF CONTENTS

STATUTES AND REGULATIONS CITED

CASES CITED

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA, :

-against- : Docket No.

ALAN GOTTFRIED, :

Defendant-Appellant :

----------x

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal from a conviction in the United States District Court for the Southern District of New York, Irving Ben Cooper, J., after trial on a five-count indictment charging two counts of bank robbery under alternate theories, and one count of resisting arrest and assault on a federal officer. 18 U.S.C. 111.

The defendant was sentenced on July 14th, 1976 to fifteen years on each bank robbery and three years for the assault on a federal officer, each count to run consecutively, and the entire sentence to be consecutive to a three-year sentence currently being served by the defendant on a violation of the federal narcotics law.

FACTS

On March 25, 1976, at approximately 9:15 a.m. (T136)[1/] a tall man of medium build (T138) whose height has been variously estimated between 6'2" (T138), 5'10" (T152), and 6' (T166) entered the Manufacturer's Hanover Trust branch at 47th Street and Madison Avenue in Manhattan (T135). He was wearing a ski cap (T138), was well dressed and carried an attache case (T138). He was also wearing dark glasses (T138). He was armed with a revolver that was silver colored. (T140).

In a period of about eight minutes (T140), he robbed the bank of approximately $12,250 (T312) and fled across Madison Avenue.

On March 25, 1976, that same day, the appellant appeared in Supreme Court, Bronx County, Part 201, where he had a case on the calendar. (T348, 349) He was seen there by his attorney Richard Wynn between 9:45 and 10:15 (T360) and by another attorney, Sidney Sparrow, between 9:45 and 10:00 a.m. (T349, 352) It was possible, however, for a person to travel on the train from 47th Street and Sixth Avenue to the Bronx Courthouse in the period from 9:30 to 10:00 (T462-468), although there was no testimony as to actual travel times by trains on March 25th or traffic conditions on that date at that hour.

[1/] Where facts seem free of conflict, only one record reference will be given although there may be many more in the record.

On the day before, March 24th, 1976, at 10:30 a.m., the Swiss Bank Corporation branch at 608 Fifth Avenue (49th Street) (T271) was robbed by a light-skinned negro (T274) who was described as 6' tall (T283, 294, 303) with a silver-colored gun (T288), wearing sun glasses (T288), a woolen cap (T288), and tape (T288) or two pieces of plastic (T303) over his nose. The Swiss Bank was not insured by the FDIC and therefore there was no federal jurisdiction.

On April 1st, 1976, the Chase Manhattan Bank branch at 110 W. 152nd Street at 10:30 a.m.(T173) was held up by a man about 6'3" (T174) or 6'2" (T187, 255) wearing multi-colored knit cap (T174) wearing a dark jacket and pants and sunglasses (T174). He got away with approximately $1,470.

On April 2nd, 1976, at about 11:00 a.m. (T316) the defendant, a 6'5" black man (T409) with offices nearby (T371) was arrested by four FBI agents (T324) on Madison Avenue near 37th Street and 38th Street (T316). He was wearing a tan hat, was well-dressed and carrying a briefcase (T318).

Two special agents, traveling north on Madison Avenue spied him at a bus stop (T320) and noting a resemblance to the mode of dress of the perpetrator of the March 24th and 25th bank robberies (T438) they placed him under physical surveillance. (T319) Observing him for several minutes, they saw him abandon his wait for a bus (T320) and cross the street and enter a branch

of Irving Trust at 39th Street and Madison Avenue (T321). He transacted no business there, but left and was followed by the two agents (T322) and two other agents in an unmarked car which was fortuitiously parked nearby (T320).

One agent, Martinolich, drew his gun and allegedly said "Freeze, FBI" (T325), put his gun to the defendant's head (T441) whereupon a struggle ensued. During the struggle, agent Henehan seized the defendant's briefcase, which proved to have a gun in it (T328), and the defendant was ultimately subdued by the four agents (T328) at which time he was bleeding from a head wound (T404-405).

The defendant made a statement about the weapon which statement was the subject of a Motion to Suppress. Although the court denied the motion, the government, for reasons known only to itself, did not introduce that statement.[2/]

Bail was fixed but never posted. The jury convicted the defendant who did not testify in support of his alibi defense on all counts of a five-count indictment. He was sentenced to 15 years on Count I, 15 years on Count III, and three years on Count V, each to run consecutively with each other and to run consecutively to three years the defendant commenced serving on a cocaine charge while he was awaiting trial on this case.

[2/] Jointly held was a hearing on a motion to suppress the weapon which the court also denied (T123-127). The gun was introduced.

ARGUMENT

POINT I

THE SEARCH OF THE DEFENDANT'S BRIEFCASE WAS ILLEGAL BECAUSE THERE WAS NO PROBABLE CAUSE TO ARREST HIM.

The trial court having resolved credibility factors in favor of the government, it remains to be seen whether, based on the government's version of the facts, there was probable cause for the arrest.

On April 2nd, 1976, two federal agents, Agent Mawn and Martinolich, driving north on Madison Avenue in New York City to return some evidence in a case, saw on a busy street corner at a bus stop a black man in a suit and tie, woolen knit hat, sun glasses, and according to them a bandaid over part of his nose. (T-3)

Pulling out two fuzzy surveillance photographs from recent bank robberies (T5), agent Mawn decided that it was possible that the defendant was the same person as the bank robber who was similarly dressed (T6, 7). Parking their car they surveilled the appellant on foot. Several buses passed which the defendant did not board (T7). He then proceeded across the street into a building which housed the Irving Trust Company. He went into the bank but did nothing there, left, and entered a lobby or alcove. He was no longer wearing the bandaid which was not recovered.

Mawn and Martinolich saw an unmarked and otherwise unremarkable car (T32) outside the building and recognized two brother agents (T10). At that time, the appellant left the building at a walk. Mawn and Martinolich apparently having decided to arrest him, followed at a walk, surrepticiously enlisted the aid of their brother officers, and almost immediately thereafter effected the arrest (T12).

Most apt in its similarity of fact to the case at bar is United States v. Shavers, 524 F.2d 1094 (8th Cir. 1975). There a black man was arrested ten minutes after a robbery perpetrated by two black men. The arresting officer heard a radio broadcast that stated one of the robbers was 5'8" tall. The appellant was 5'7". The arrest took place ten minutes after the crime about one block away, the appellant was walking fast, and his pants were wet and had grass stuck to them.

The Shavers court's language in finding no probable cause is most appropriate here.

> At 9 o'clock on any weekday morning, many individuals answering to the broadcast description could be found in a business district such as the one where Shavers was arrested. United States v. Nichols, 448 F.2d 622, 625-26 (8th Cir. 1971) (black men in predominantly black area at "reasonable hour" did not give probable cause for investigatory stop). Nor is the accused's proximity to the crime a persuasive factor, since the record suggests that approximately ten minutes had elapsed between the robbery attempt and when he was arrested only a block from the bank.

Id. at 1095

On a weekday morning in Midtown Manhattan, it is not unusual to see a well-dressed black man either waiting for a bus or entering a bank. In fact, many reasonable explanations come immediately to mind. For example, any normally productive citizen, waiting a long time for a bus as other buses pass, might give up temporarily and then enter a bank to obtain change for a large bill.

The fact that this must have crossed the minds of Mawn and Martinolich is apparent since they did not take action until they had decided that the appellant had "made" their brother agents outside. The record is barren, however, as to how the appellant in the short interval available to him might have done this. If this influence was the crucial factor in precipitating the arrest, then it cannot stand.

The trial court's reliance on Terry v. Ohio, 392 U.S. 1 (1968) and Chambers v. Maroney, 399 U.S. 42 (1970) was inapposite. In Terry, under more provocative conditions, a police officer of over 30 years experience observed two men make an aggregate dozen trips to peer in a store window. When he queried them, they reacted suspiciously and then he merely patted them down. It was that limited intrusion before arrest that was upheld in Terry. Had the officer first arrested and then searched, as they did here after an arrest, the search would have been thrown out.

In the case at bar, the first contact between police and suspect were the words "FBI-Freeze" accompanied by the sight of a large hand weapon pressed against the defendant's head. Terry was hardly designed to cover such circumstances.

Nor is Chambers, supra, more relevant since there a particular description of a particular car with a description of men with particular color and style of clothes was accompanied by the arrest of men in identical clothes in an identical car within one hour of a less busily traveled thoroughfare at a time of night when similar traffic would have been sparse.

No probable cause having been present for the arrest, the evidence seized as a result should have been suppressed.

POINT II

THE COURT DID NOT PROPERLY EXERCISE ITS DISCRETION IN REFUSING TO SUPPRESS THE APPELLANT'S RECENT NARCOTICS CONVICTION IN ORDER THAT HE MIGHT TESTIFY.

The appellant was convicted in the early part of the year 1976 of one count of importation of cocaine. The trial record is barren of the date, but it is apparent that the trial court considered it of very recent vintage. (Ap. 12a) Although he had a 1961 robbery conviction (Ap. 9a), its age would have barred cross-examination on it. Rule 609(b) Federal Rules of Evidence.

Appellant moved on papers in advance of trial for a ruling to determine whether or not the government would be allowed to cross-examine on the drug charge. See, United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968). The government responded in a two-page memorandum. No evidence was taken on the issue (T114), but oral argument was heard by the court immediately before openings to the jury. The court ruled in favor of the government.

Under Rule 609(a) Federal Rules of Evidence, the procedural aspects of this ruling take on new dimensions since the wording of the rule in the conjunctive makes plain that the government has the burden of showing the admissibility of the

prior conviction. Weinstein's Evidence, ¶609-77, 609-78. See, Gordon v. United States, 383 F.2d 936, 939 (D.C.Cir. 1967).

> RULE 609 - IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
>
> (a) General rule.--For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. (Emphasis supplied)

Although it is far from clear upon what standard the government must meet this new burden, which shifts by the Rule from prior practice, it is apparent from the record that the court deemed the burden to be on the defendant. Nor did the government address itself to the issues which were pertinent to the sustenance of that burden. The test prior to the adoption of Rule 609(a)(1) was stated in United States v. Palumbo, supra, and United States v. Puco, 453 F.2d 539 (2d Cir. 1971).

> If a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly.

Puco, supra, at 541.

It seems clear therefore that the government now has to show that the conviction has more than a slight effect on credibility and that there is no substantial chance of unfair

prejudice. This, weighing all the relevant factors as announced in Palumbo and Puco, supra, the government did not do.

A narcotics conviction is not particularly relevant to in-court veracity. United States v. Puco, 453 F.2d 539 (2d Cir. 1971) 3/

It seems, therefore, that under the shifted burden the rule in this Circuit should bar, in the normal trial, use of a narcotics conviction to impeach credibility since the government cannot get by the first prong of the inverted Palumbo-Puco test.

The trial court and government referred to the freshness of the cocaine conviction to blunt what each apparently saw an a necessary element to excluding the conviction. The government in its response to the motion and the court in its ruling missed the thrust of the defendant's argument that it was the very recency of that conviction which would make prejudice inure to the defendant.

3/ In footnotes 10 and 11 to Puco, the court set aside the question of whether a narcotics conviction could ever be used to impeach, essentially leaving the question dealt with in United States v. McIntosh, 426 F.2d 1231 (2d Cir. 1970) for another day. The Puco court did seem to indicate some approval of Chief Judge Bazelon's strongly worded dissent. McIntosh has been questioned in its own circuit, however, since the advent of Rule 609. United States v. Millings, 535 F.2d 121, 123 (D.C.Cir. 1976).

That narcotics convictions are inherently prejudicial in the greater New York area with its endemic drug problems and satellite criminality can no longer be denied. The very recency of the conviction only months before this trial would have fanned the fires of prejudice in the minds of the jurors leaving a lasting impression of basic criminality which is the stigma sought to be avoided by the rule. No limiting instructions could have cured that feeling. The trial court and the government did not deal with that argument, although it was clearly made in the defendant's memorandum.

Balancing these two prongs of the test--impact on veracity vs. prejudicial impact--it is clear that the trial court should have come out on the side of exclusion. As this court said recently in an analogous context

> The testimony...established a very weak influence at best...; it was likely to have had a significant prejudicial impact on the minds of the jurors....
>
> United States v. Robinson (Slip Opinion, November 1, 1976, p. 5920) 4/

4/ The first two elisions in the quotation refer to the item suppressed, a 38-calibre gun and a reference to the purpose for which it was offered, to wit, identity as one of the bank robbers, respectively. If this court substituted the words "of prior narcotics conviction" and "of lack of veracity" for the elided material, it would be seen how closely this interpretation of Rule 403 of Federal Rules of Evidence parallels the instant case. The final elision refers to the closeness of the case and the prejudice enuring from the inclusion of the evidence. The court's attention in this regard is respectfully drawn to the discussion of the purpose of the defendant's testimony had he testified, infra.

The entirely credible testimony of two trial lawyers, Sidney Sparrow (T347-358) and Richard Wynn (T359-371) are far from exact in terms of time, as one might expect. Coupled with the rebuttal testimony of Patricia Leinz (T462) as to travel time, it is clear that this type of alibi defense, by its very nature, cries out for the defendant who could not testify.

Similarly, the testimony of three FBI agents as to events which were hotly contested are, perhaps, unsatisfactorily answered where, as here, the defendant argues that they perjured themselves(T531-532) if the defendant does not give sworn testimony himself. See, generally, Gordon v. United States, supra, at 940-041; Weaver v. United States, 408 F.2d 1269 (D.C.Cir. 1969).

It is apparent from the full record that the court treated the defendant's Puco motion lightly and failed to meet the arguments of the defendant, but relied merely on one element of the four-prong Gordon analysis, which was inapplicable. The court abused its discretion in denying the motion.

POINT III

THE TRIAL JUDGE'S LIMITING CHARGE ON A SIMILAR UNCHARGED CRIME WAS ERRONEOUS AND PREJUDICIAL.

It is clear from any reading of the collected cases in the area of proving uncharged criminal conduct of a defendant in a criminal trial, that while the appellate courts give lip service to the dangers to be avoided, i.e., proof solely of bad character, the exceptions to the exclusionary rule are so numerous as to eliminate the possibility that the entry of the proof, without more, might be reversible error. See, United States v. Deaton, 381 F.2d 114 (2d Cir. 1967); Weinstein's Evidence, ¶404[08] et seq. p. 404-41.

What has emerged as a rule of thumb is that where the government needs the evidence in one of the permissible areas, its probative value is deemed high, and unless the crime is of such a nature as to be almost beyond imagination, the counter-balancing prejudice is deemed low. See, United States v. Woods, 484 F.2d 127, 141 fn 5 (4th Cir. 1973) (dissent of Judge Widener).

Given the discretion clearly allowed to the trial judge, appeal on an abuse of that discretion would seem to be an act of futility, but it seems fair to say that where the usefulness of evidence of another crime is marginal, the necessity

of care in limiting the prejudicial impact of that evidence is increased and the court's limiting charge must be sharply honed.

That the trial court applied a strict need test is clear from the record, and unfortunately, from the limiting charge. In a sidebar conference, while ruling that the government could not open on the Swiss Bank robbery, the court said

> I want to be in a position where I can say there was enough evidence of identification, and I refuse to allow the Swiss Bank material in; or there was insufficient evidence on the question of identification and therefore the application of the government with regard to the Swiss Bank is permitted.
> (Ap. 15a)

After hearing five identification witnesses from the two charged bank robberies, the court's ultimate ruling was belatedly precipitated by the government's desire to arrange its witnesses for the next trial day. (Ap. 16a)

The court stated the gravamen of its ruling early.

> I was reflecting on the evidence as it has been adduced today, and the issue of identity, which is the sole criterion, as I read the law, which should govern the admissibility or inadmissibility of evidence relating to the Swiss Bank episode, has come into sharp focus.
>
> Mr. Cohn succeeded on cross-examination in bringing from different witnesses a lapse of memory. Some of them described the glasses worn by the defendant, had a different version from others.

> You recall that Mr. McAteer said that the band-aid was between the eyeglasses and the hairline, at the temple, whereas another witness said that the band-aid was on the nose.
>
> Mr. Cohn also hammered away and got witnesses to vary in their testimony on certain important particulars, I think, and that's his duty, and that was his function.
>
> The identity then leaves room for debate. (Ap. 17a)

In making this ruling, the court was fully familiar with the profferred exhibits from the Swiss Bank robbery and knew exactly what the prejudicial impact of the evidence could be, and proposed specifically tailored language approved by the Fifth Circuit in United States v. Jackson, 451 F.2d 259 (5th Cir. 1971)[5/] Defense counsel's concern over the impact of the charge, due to the judge's analysis as to its need, was obvious and defense counsel at first attempted to waive any limiting charge at all. (Ap. 36a) When that failed, the Jackson language was accepted with a request that the judge

---

[5/] The charge approved in Jackson is

> [T]he only reason I've let in other occurrences, as I previously told you, is that if there be such a similarity of method, sometimes that may shed some light--sometimes it doesn't--sometimes it may shed some light or indicate in some fashion that the two offenses were committed by the same person, because the method of their commission was alike.

Jackson, supra, at 263, fn 6.

engraft some language to make clear to the jury that just because the proof was being offered to assist in the identity issue did not mean that it would necessarily do so. (Ap. 45a)

The court's actual charge[6/] reproduced below, was stunning in its lack of resemblance to that proposed. (Ap. 46a-48a) Not only did the court avoid the succinct Jackson language, but

---

6/ The Court: Swiss Bank Corporation. Now, this defendant on trial before you is not charged with any crime relating to the Swiss Bank. Then why do we allow that evidence in? It is to enable the jury to consider it in connection with the problem of identification. Was this defendant on trial before you the man at the Chase Bank? Was he the man at the Manufacturers Hanover Bank? It must be clear to you by this time that the witness testified about a person coming into the bank, the Chase Bank and the Manufacturers Bank, and according to them, using the words and the gun, and all the rest of it, it was enought to put them in a certain amount of fear, and so the identity is not as clear cut, defined as it might be, let's say, if there was a conversation under ordinary circumstances lasting 10, 15 minutes in which a person would have had opportunity to sum up and closely observe the person being interviewed. And so the law says that the Court in its discretion may admit the evidence which you are about to hear for the limited purpose of identification. And the Court must insist that you understand that it's going in for that limited purpose and that you will obey the court's direction that its admissibility was for that purpose and not to prove another crime. Do I make myself clear? Has anybody any doubt about it? I can't give you the whole law on that right now. It will become far more clear after you hear the evidence and after the judge comes to the point where he charges the jury on the law, but right now I just want to know whether what I have said in and of itself makes sense and is clear to you. And you're not to hesitate when the judge says, "Is it clear?" You are not to hesitate to raise your hand and say "Judge, I don't quite get this," or "I don't quite get that." Don't hesitate to do that. I ask you again, what I said, is it clear to you? Has anybody any question on it?

pointed up the problems in the government's case that it was designed to cure. Counsel, his position clear on the record in camera, did not need to point up his client's discomfiture with the charge by making a pro forma objection in front of the jury.

That the defendant was prejudiced by this charge and the unnecessary admission of testimony under it cannot be doubted. Of the six prior identification witnesses, none failed to identify the defendant in open court. Small inconsistencies were developed with each one, but not one of the witnesses retracted his or her identification.[7/]

[7/] The defendant was 6'5" tall black man with a black modified afro and light skin.

Evelyn Aird in court said the culprit was 6'2" (T138) and admitted a prior inconsistent statement of indicating the bank robber was 6' tall (T142) which the court then rehabilitated. (T142)

Richard Caro, who almost exactly guessed defense counsel's height (T157) said that the bank robber was a little taller than the 5'8" bank guard (T152) and conflicted on other small details.

Louis Cicillini described the bank robber as 6' tall (T166) and described the side burns of the bank robber (T157). He admitted on cross examination that he could not describe to the FBI the facial characteristics of the bank robber. (T171)

James Dishington positively identified the defendant down to a line on his fact (T175) which he had described to the FBI after the events as a pock mark (T185). He had been unable to identify the defendant in a photo spread shown to the witness in the U.S. Attorney's office the week before the trial. (T181, 182-4) He refused to change his identification.

Michael McAteer described the bank robber at 6'2" (T187) but his description of the clothing and acoutrements of the bank robber was at odds with surveillance pictures in evidence. (T191-205)

Morris Pittinsky identified the defendant (T219) and picked his ficture from the same photo spread that Dishington failed at. He had small recollection of any of the acoutrements of the bank robber.

Nonetheless, the Court using its own perception of the trial process decided that the government needed four more witnesses whose testimony was subject to the same infirmities.[8/] Each of them was subject to to much the same minor infirmities despite their rockhard determination to identify the defendant in Court. [9/]

This cumulation, therefore, bolstered by the court's charge, of people who stolidly identified the witness despite all the inconsistencies, could not help but cement an impression in the minds of the jurors of a positive identification, where if the judge's charge had not strongly inferred that this evidence was going to cure everything, the infirmities of the identifications would have been more apparent.

[8/] Counsel objected to the 10th identification witness, Anthony Norton, on cumulation grounds as well as prior objections.

[9/] Margaret Alston mistated height of the robber if he was indeed the defendant. (T255)

Gemma Durand stated on direct that the robber had a pock marked face (T275) but on close inspection of the defendant could not see those marks (T277).

Frank Grasso misidentified another person from the picture spread (T291).

Anthony Norton swore the bank robber was not wearing glasses (T308) and that he had freckles under his eyes (T305).

POINT IV

THE COURT'S SUPPLEMENTAL CHARGE ON THE AMOUNT OF FORCE PERMISSIBLE WAS UNRESPONSIVE, ARGUMENTATIVE, AND PREJUDICIAL TO THE DEFENDANT.

A. Count 5 Of the Indictment Should Be Reversed.

During his original charge to the jury, at the request of defense counsel, the court correctly charged the following language.

> Of course, if a defendant, acting in good faith, out of an ignorance of the officer's identity, believes that he is acting in lawful defense of his person or property, and used no more than reasonable force in effectuating that purpose, he might be justified in exerting an element of resistance, and such an honest mistake of fact would be inconsistent with criminal intent.
> (T 579)

Scienter had been hotly contested in terms of the defendant's intent, as the cross examination of all the agent witnesses and the summation makes clear. See, United States v. Ulan, 421 F.2d 787 (2d Cir. 1970); United States v. Perkins, 488 F.2d 652 (1st Cir. 1973).

The jury later requested the entire charge re-read to them as to Count 5 (T618-9) which request the court granted. (T619-629) It concluded at 6:53 p.m. (T629). Deliberations were recessed until 8:30 p.m. for dinner and at 9:10 a new note was received (T629). It said:

> Law concerning assault on officer and right to self-defense regarding 5th charge. What does the law say if there is a reasonable doubt that the defendant

> was aware of the identity of the FBI agents? If ignorant, what rights does the defendant have to defend himself? Could you explain this point in layman's language?

This note clearly indicates that at least some juror on the jury, if not all, had a reasonable doubt as to whether Hayes knew the identity of his assailants. They now wished to consider whether his actions were reasonable in the light of this ignorance. Defense counsel argued for that interpretation at trial. (Ap. 50a-[illegible] He offered to try and "hammer out" some laymen's language (Ap 51a) but then, after the court indicated an interpretation not supported by the record or argued by counsel (Ap. 51a) counsel fell back on a demand for a rereading of the court's charge on reasonable force. The court indicated it would try to "get the point home" (Ap. 52a) and defense counsel, at that time, made sure he would get an opportunity to object. (Ap. 52a)

The charge itself (Ap. 53a-57a) ending at 10:00 p.m. (T647) consisted of a 30-minute long exegesis which was not only unresponsive to the note, but by use of inapposite example, was argumentative and prejudicial. It reduced the defense argument to an absurdity. The court's example of a seizure of drugs from the defendant could not even be used by the prosecutor in summation in a case where not a hint of drugs was in the case. Aside from its prejudicial value to any New York area jury, it was not responsive to the note, but addressed the agents' right to use an

arrest procedure with minimal announcement of their authority.

The second example of a deaf person, which the court itself characterized as extreme (Ap. 56a) is a classical rhetorical device which would be unobjectionable if used by the prosecutor, but coming from the court it had a devastating effect. See, Boatright v. United States, 105 F.2d 737, 739 (8th Cir. 1939).

> The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference and may prove controlling.
> Quercia v. United States, 289 U.S. 466, 470 (1933)

The impact of this charge cannot be gainsaid. After polling the jury as to their understanding (Ap. 58a-60a) the judge continued on with an unbalanced statement of the law, again emphasizing the "deaf person analogy"[10/] and in a clear attempt to protect his record, then re-read his charge on scienter's effect on intent. Pro forma language followed disclaiming any opinion. This does not protect his record from having delivered a directed verdict of guilty, evidenced 8 minutes later when the jury returned. Counsel's objection adequately preserves the point. (Ap. 67a-68a) [11/]

[10/] This in response to juror No. 10 (Ap. 60a)

[11/] The court's observation as to defense counsel's tone of voice were accurate. It was,however, not in the presence of the jury and was the only time during the trial that defense counsel had permitted his personal feelings to show.

Last minute instructions impose a duty of special care and when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). No one expects a trial court to be a mere moderator. Quercia v. United States, supra, at 569, but he should not take on "a prosecutor's zeal inconsistent with that detachment and aloofness which courts have again and again demanded particularly in criminal trials. Despite every allowance, he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused." United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945)

This was no mere stylized example, which is superfluous and better left unsaid. United States v. Lozaw, 427 F.2d 911, 916 (2d Cir. 1970)[12/] but more analogous to the comments made to the jury by the trial judge in United States v. Porter, 386 F.2d 270 (6th Cir. 1967) which that court called, by citation to one of its earlier cases, a "directed verdict." Porter, supra, at 275. Citing Buchanan v. United States, 244 F.2d 916, 920 (6th Cir. 1957); See also United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971).

12/ Case on appeal from Southern District of New York, Cooper, J.

In Musgrave, supra, relying on United States v. Marzano, supra, the Fifth Circuit said

> In his charge to the jury as well as in his examination of witnesses, the trial judge must be extremely careful to refrain from becoming an advocate for the government (citation omitted). If the trial court fails in his duty, the jury is almost certain to get the idea that the judge is on the side of the government. The cloak of impartiality which the judge should wear is destroyed. United States v. Hill, 333 F.2d 105, 106 (7th Cir. 1964); See Gomila v. United States, 146 F.2d 372, 372-74 (5th Cir. 1944).

Musgrave, supra, at 761.

Nor is this merely a "hypothetical illustration [which] should be avoided because of the likelihood that they may divert the jury." United States v. Cassino, 467 F.2d 610 619 (2d Cir. 1972). [13/] It was a direct attack on the defense theory. (See defense requests to charge) No jury could resist the import of the charge that in the opinion of the court, the defendant was guilty. Here, the judge's last word proved to be the decisive word. Bollenbach v. United States, 326 U.S. 607, 612 (1946).

[13/] Case on appeal from Southern District of New York, Cooper, J.

B. The Supplemental Charge Infected the Entire Verdict

While the impact of the supplemental charge on Count 5 of the indictment is readily apparent, its effect on the rest of the trial should also be closely examined. Defense counsel, immediately after the conclusion of the trial, moved for a mistrial on the grounds of the undermining of the presumption of innocence and the muddling of the rest of the trial by the supplemental charge. (Ap. 68a)

While it is true that the jury had apparently been considering Count 5 for some time, we have no way of knowing whether they had reached a resolution on Counts 1-4.

The judge in his examples constantly referred to situations where the accused was guilty of underlying crimes although it is clear that the law would be no different were there no probable cause on which to have based the arrest. See United States v. Martinez, 465 F.2d 79 (2d Cir. 1972). For example:

> Let's take an extreme case. A man is deaf and he doesn't hear the officers say "I'm FBI" or "I'm a detective on the police force of this locality and I have a warrant for your arrest." The man is dressed in plain clothes; there is no insignia; there is nothing that a person about to be arrested can look to; and it requires quick action. Oh, it's easy when there is no requirement of quick action, when the offender isn't doing anything, when the offender isn't offering any resistance; when the offender hasn't got a gun that he's liable to use, when the offender--

> when the officers have no reason to fear. That's a pushover; there is nothing to that.
>
> You don't use force under those circumstances. That is easy. But suppose he didn't hear and they actually were law enforcement officials having a perfect right to execute a warrant for his arrest, and he believes that these are strangers--let's take that extreme example--who are they? He doesn't know. That's an extreme example. Then he might very well have a perfect right to resist their efforts to touch him.
>
> (T636) (Emphasis supplied)

This kind of charge taken in context of certain remarks in front of the jury clearly must have told the jury the court's opinion of the whole case. [14/] United States v. Desisto, 289 F.2d 833 (2d Cir. 1961). Cf., Burns v. Elrod, 509 F.2d 1119, 1132-1134 (2d Cir. 1974). See also, United States v. Boatner, 478 F.2d 737 (2d Cir. 1973).

[14/] Examples of the court's intervention (all in front of the jury) none of which, were it not for the vitriol of the final charge, could by themselves be cause for reversal, are as follows:

1. Rehabilitation of a government witness into changing her testimony about a prior inconsistent statement to the advantage of the government (T142-43).
2. Comments to counsel implying that defense counsel is being unfair. (T226-233)
3. Court inference that I would unjustly accuse him of being unfair and implying that the defendant would lose.
   "I don't want you saying later you were rushed." (T309)
4. Court's characterization of a damaging piece of government's testimony:
   "Would you do that slowly, please, I think that's rather important." (T331, L7)
5. Characterization of defense witness as a bad witness. (T367)
6. Court's prevention of a stipulation between government and defense and characterizing it as important thereby preventing defense from minimizing the damage (T420)

(cont)

What then emerges in this short trial is a picture for the eyes of a lay jury of the court and the prosecutor on one side, and defense counsel as their adversary trying to trick court into error on the law on one hand, and divert the jury into error on the facts on the other. 15/

Hindsight also tells us that in fact the court had rather strong opinions, both about the defendant and his attorney. See, court's opinion on application for the defendant to be permitted to appeal in forma pauperis. (Ap. 79a-89a) That this opinion was communicated in terms that a cold record cannot begin to adequately represent can be seen by any lawyer or jurist who has been in a trial courtroom in a professional capacity. But see, United States v. Weiss, 491 F.2d 460 (2d Cir. 1974)

Counsel realizes that as to Counts 1 through 4 the government had a strong case, yet that should not mitigate

---

14/ Interference with defense summation on pretext of time reminder. Then saying "I don't want you to say later on that you haven't gotten you full opportunity to sum up," (T534) infering again the anticipated need for the appellate process. But see court's corrective charge after the defendant's protest outside the presence of the jury. (T551)

15/ Counsel by linking the government to the court together in no way seeks to imply that government counsel invited the court to become an adjunct prosecutor. The Assistant United States Attorney's conduct throughout the trial was a model of fairness.

against reversal for basic unfairness. Counsel welcomes the close examination of the record that usually follows particularly shrill cries of foul. It is respectfully suggested that defense counsel did not precipitate the court's remarks. United States v. Sclafani, 487 F.2d 245 (2d Cir. 1973).

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted

Frederick H. Cohn
Attorney for Appellant